Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2001

GEORGE BARBOZA,
Petitioner

V.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSTTS

PETITION FOR WRIT OF CERTIORARI

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63pgs

QUESTIONS PRESENTED FOR REVIEW

1. Should the federal wiretap statute be read to permit intra-family eavesdropping on a theory of vicarious consent or under the ordinary course of business exemption?

2. Are state appellate courts free to make up ad hoc tests for determining whether or not federal constitutional error is harmless without violating the Fourteenth Amendment?

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OPINIONS BELOW

The opinion of the Appeals Court of Massachusetts is reported, *Commonwealth v. Barboza*, 54 Mass. App. Ct. 99, 763 N.E.2d 547 (2002), and is attached hereto in the Appendix. The Appeals Court affirmed the petitioner's convictions. The Supreme Judicial Court of Massachusetts denied further appellate review on May 2, 2002. *Commonwealth v. Barboza*, 436 Mass. 1104 (2002). *See* the Appendix.

JURISDICTION

The order of the Supreme Judicial Court denying further appellate review entered on May 2, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The lengthy state and federal statutes at issue, M.G.L. c.272, §99, 18 U.S.C. §§2510, 2511, and 2515, are reproduced in the Appendix; the constitutional provisions are reproduced here.

Fourteenth Amendment, United States Constitution

...No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sixth Amendment, United States Constitution

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On March 7, 1997, a grand jury sitting in Middlesex County returned six indictments against the petitioner George Barboza. All of the charges arose from the petitioner's alleged sexual involvement with Daniel Vokey during the time frame of May, 1995 to November, 1996. Four indictments alleged rape of a child and two indictments alleged indecent assault and battery on a child under fourteen.

The petitioner moved to suppress tape recordings of four of his conversations with the alleged victim which had been secretly recorded by the alleged victim's father. The motion itself claimed generally that "these conversations were intercepted illegally." The Memorandum in support of the motion cited no cases and referred only to the Massachusetts wiretap statute, G.L. c. 272, §99.

The trial court held an evidentiary hearing on the motion which was without factual controversy. The alleged victim's father attached a recording device to the phone in his bedroom, and that device secretly recorded four phone conversations between the petitioner and the alleged victim. Two of the conversations were recorded before the police were aware of what was being done, and two were recorded after contact with the police.

Judge Barton allowed said motion in part (as to two calls recorded after the police were notified) and denied said motion in part (as to two calls recorded on January 30, 1997 before the police were notified). On appeal the petitioner argued that he was denied his federal constitutional right to effective counsel since counsel failed to explicitly raise the federal statutory argument and/or that the federal statutory requirements were incorporated into the state statutory scheme which had to be at least as strict as its federal counterpart.

The Appeals Court seemed to accept the logic of this position that such a failure could constitute ineffective assistance of counsel and that the state statutory scheme could not be less restrictive than its federal counterpart; but rejected the issue on its merits by concluding that Title III was not violated since there was an exception for secretly recording your own minor son in your own home when motivated by concerns for the child's welfare. *See Commonwealth v. Barboza, supra*, at 107.

The petitioner was tried before the Honorable Judge Burns and a jury from April 17, 1998 to April 24, 1998. During deliberations, the jury asked to hear again the two tape recorded conversations that were admitted into evidence. On the second day of deliberations, the jury returned guilty verdicts on all the indictments. The petitioner was given four concurrent sentences of not less than ten years nor more than twelve years on the four rape convictions. The petitioner was given two concurrent sentences of not less than five years nor more than seven years on the two indecent assault and battery convictions; said sentences to take effect from and after the sentences on the rape charges and to be suspended while the petitioner was on probation for ten years.

The trial itself was a classic swearing contest between the alleged victim and the petitioner, with the Commonwealth holding the advantage because of the two recorded phone conversations on January 30, 1997, and the two calls in February that were monitored by Detective King of the Wilmington police. This was an advantage, but not the overwhelming case of guilt posited by the Appeals Court. The petitioner had an innocent explanation for each attack launched by the prosecution during its cross-examination of him. Given the Appeals Court's view that the error of restricting cross-examination was harmless, the details of the trial evidence are significant and are recited here.

Wayne and Mary Vokey testified that they were husband and wife, and that Daniel Vokey was the younger of their two sons. *See* Tr. 3:54. They described their family's friendship

with the petitioner. The petitioner visited them about once a month when they lived in Dracut; after they moved to Wilmington in July of 1993, the visits became more frequent. Tr. 3:57-58, 172. The petitioner was treated like he was part of the family. Tr. 3:59, 175.

The petitioner was allowed to take Daniel Vokey to his home for sleepovers on weekends. He tutored Daniel Vokey when he did badly in school. Tr. 3:70. The petitioner and the Vokeys exchanged gifts. Tr. 3:176. The family visited the petitioner at his winter home in Florida, and Daniel Vokey spent a school vacation there by himself. Tr. 3:74. The petitioner would call the Vokeys when he was in Florida and they would call him. Tr. 3:76.

The Vokeys spent Christmas of 1996 in Florida with the petitioner. Tr. 3:80. While there, the petitioner showed them a home that he said he wanted to retire to and where Daniel Vokey wanted to live after high school. Tr. 3:188.

When the family returned to Wilmington, Wayne Vokey bought a recording device and put it on the phone because of his concerns about his son. Tr. 3:89. Two calls were recorded on January 30th. Tr. 3:93, 97. Wayne Vokey listened to the tape of the calls; he then went to his parents' house, and called the police. Tr. 3:194, 196.

After speaking with the police, Wayne and Mary Vokey confronted Daniel Vokey on February 5th. Tr. 3:200-02. At first, Daniel Vokey denied any sexual relationship with the petitioner; but, when they told him they had a tape, he broke down crying and admitted it. Tr. 3:204-06.

Daniel Vokey testified that he was sixteen years old. Tr. 2:31. He claimed that starting when he was twelve, the petitioner began an escalating sexual relationship with him. Tr. 2:57-92. They kissed on the lips; the petitioner touched his penis above his clothes; the petitioner and he would touch each other with their clothes off; they performed oral sex on each other; and, they performed anal sex on each other. Daniel Vokey

claimed that he did not tell anyone because the petitioner threatened that he would shoot him and then himself. Tr. 2:95. Pat King testified that he was a detective with the Wilmington police. Tr. 3:242. As a result of his involvement in the case, he learned that the petitioner was expected to call Daniel Vokey on the morning of February 8th. Tr. 3:247. He listened to that call. Tr. 3:248-49. The petitioner said that the card he sent was a true representation of how he felt, and that the card should be thrown away after it was read. Tr. 3:251-52. The petitioner said that he wanted to take care of Daniel for the rest of his life and that he needed one hundred percent of his attention. Tr. 3:253. He said he would call back on February 11th at 4:00 p.m. Tr. 3:254.

Detective King listened to that call too. Tr. 3:258-59. The petitioner said that he really wanted to come home and see Daniel. Tr. 3:260. He asked if he liked the card. Tr. 3:260-61. He said he couldn't wait to see Daniel. Tr. 3:262. The petitioner said he was going to be overpowering and he hoped Daniel would be overpowering too. Tr. 3:262. The petitioner said that there had to be a cut off on masturbation. Tr. 3:264-65.

Without Daniel Vokey's testimony that there was an actual sexual relationship between himself and the petitioner, the Commonwealth was not even over the rail. Thus his credibility, although bolstered by the other evidence presented by the prosecution, was the crucial issue in the case.

The petitioner testified that he was fifty-seven years old, and although injured during the preceding year, had run a landscaping business for twenty-seven years. Tr. 4:8-9. He was given up by his mother as an infant, and lived in about twenty-seven different foster homes. Tr. 4:10-11. The Vokeys' treatment of him as a family member was thus important to him. Tr. 4:28.

The petitioner said that the only physical contact he ever had with Daniel Vokey was hugs. Tr. 4:63. He explained the phone conversations (recorded and overheard); he loved Daniel Vokey very much and didn't want to desert him because he had been deserted as an infant. *See* Tr. 4:49-50; 70-81. He had

become a regular at the Vokeys because Daniel Vokey was flunking the eighth grade. Tr. 4:31. He had offered the trip to Florida as an incentive for better school work. Tr. 4:33.

Daniel Vokey was asserting himself more in the house and there were more arguments with his parents. Tr. 4:49. He treated Daniel Vokey as a son. Tr. 4:50-51. On one occasion, he told Wayne Vokey, after seeing a welt on Daniel Vokey's neck, that the next time he struck his son he would call the police. Tr. 4:42. He tried to treat Daniel Vokey as an equal, always telling him the truth. Tr. 4:65. He answered his questions about masturbation. Tr. 4:65-66. In retrospect, he believed he acted too much as a substitute father. *See* Tr. 4:66, 79. The petitioner said that Daniel Vokey was not always honest and often played mind games. *See* Tr. 4:95, 123-24. This important testimony was corroborated by the Vokeys. Daniel Vokey said he made up stories for his parents. Tr. 3:19-20. Mary Vokey said her son would say things that the listener wanted to hear. Tr. 3:140.

With both the alleged victim Daniel Vokey and his mother Mary Vokey, the petitioner on cross-examination attempted to explore the Vokey family's financial interest in this case. Daniel Vokey admitted he had seen a private civil lawyer, Mary Ames. *See* Tr. 3:25. When defense counsel sought to put the issue into its relevant context, the prosecutor's objections were sustained. *See* Tr. 3:25-26. Defense counsel went back to the topic with Mary Vokey, and again was rebuffed. *See* Tr.3:154.

In closing argument, the prosecutor pressed the defendant's motive to lie, knowing he had successfully blocked defense counsel from this playing field. "Does he have a motive to lie or to fabricate? I think we all know the answer to that question. He's on trial for extremely serious charges." Tr. 4:162. Having secured the "interest" playing field exclusively for the Commonwealth, the trial court charged on the issue of interest. *See* Tr.4:172.

On appeal the petitioner challenged this restriction on his cross examination, claimed that it violated his Sixth Amendment

rights, and cited to *Davis v. Alaska*, 415 U.S. 308 (1974). The Appeals Court recognized that this was error; but, for its harmless error analysis it cited to a state case that sets out a test for non-constitutional error. *See Commonwealth v. Barboza, supra,* at 109-10.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents substantial and important issues concerning the reach and application of the federal wiretap statute to intra-family eavesdropping, and the Circuits are split on the issue. This case also presents the substantial and important issue of whether a state appellate court is required to apply appropriate federal constitutional harmless error analysis, or can simply choose any test it wants.

A. The Federal Wiretap Statute Should Not Be Read To Permit Intra-Family Eavesdropping.

In substance, the requirements of the Massachusetts wiretap statute are the same as the federal statute. However, in some regards, the reach of the Massachusetts statute is broader. The state appellate court conceded that when an interception is illegal under the federal statute, the state statute must be read as stringently as its federal counterpart.

In the case at bar, it is the petitioner's contention that the interceptions by means of a recording device attached to a phone without the knowledge or consent of any party to the phone conversations were heartland violations of both the state and federal statutes. While the state may be free to interpret its statute any way it chooses when no federal violation has occurred, it must follow federal law when interpreting the federal statute.

Here, the Appeals Court grafted onto the federal statute an exception for recordings by "parents of their own minor son talking on the telephone in their own home motivated by concerns that he was being sexually exploited by an adult." Of

course, this language does not appear in Title III. The Appeals Court surveyed the federal case law and found no conflict in it. However, there is a substantial split in the Circuits as to intra-family eavesdropping, and for those Circuits accepting it, the rationale for so doing.(vicarious consent or ordinary business exemption) See long discussion with citations in *Vieux v. Pepe*, 184 F.3d 59 (1st Cir. 1999), *cert. denied*, 528 U.S. 1163 (2000). *Compare Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir 1989) *and Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984) which reject the ordinary business exemption *with Scheib v. Grant*, 22 F.3d 149, 153-54 (7th Cir.), *cert. denied*, 513 U.S. 929 (1994), *Newcomb v. Ingle*, 944 F.2d 1534, 1535-36 (10th Cir. 1991), cert. denied, 502 U.S. 1044 (1992), *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2nd Cir. 1977), *and Simpson v.Simpson*, 490 F.2d 803, 810 (5thCir.), *cert. denied*, 419 U.S. 897 (1974) which accept the ordinary business exemption. Only the Sixth Circuit has adopted a vicarious consent exception (while noting that that Circuit had already rejected the ordinary business exemption accepted in some other Circuits). *See Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998).

The myth of intra-family eavesdropping is that it is intra-family. Here the petitioner was intercepted and recorded as anyone would have been who called that household whether or not any family member at all was engaged in the conversation. The petitioner was not a member of that family, and Title III was enacted to protect his rights too. The plain language of the statute was violated here.

B. The Appeals Court of Massachusetts Cannot Ignore the Harmless Error Test For Federal Constitutional Error And Pick Any Ad Hoc Test It Chooses.

With both the alleged victim Daniel Vokey and his mother Mary Vokey, the petitioner on cross-examination attempted to explore the Vokey family's financial interest in this

case. Daniel Vokey admitted he had seen a private civil lawyer, Mary Ames. *See* Tr. 3:25. When defense counsel sought to put the issue into its relevant context, the prosecutor's objections were sustained. *See* Tr. 3:25-26. Defense counsel went back to the topic with Mary Vokey, and again was rebuffed. *See* Tr.3:154.

In closing argument, the prosecutor pressed the defendant's motive to lie, knowing he had successfully blocked defense counsel from this playing field. "Does he have a motive to lie or to fabricate? I think we all know the answer to that question. He's on trial for extremely serious charges." Tr. 4:162. Having secured the "interest" playing field exclusively for the Commonwealth, the trial court charged on the issue of interest. *See* Tr.4:172.

The Sixth Amendment right of confrontation includes the right of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315 (1974). The partiality of a witness is subject to exploration at trial and is always relevant. *Id.* at 316. The exposure of motive is an important function of the constitutional right of cross-examination. *Id.* at 316-17. Here, the jury was entitled to know sufficient information about the Vokeys' clear desire to financially profit from the allegations they leveled against the petitioner.

The Appeals Court recognized that this was error, but never characterized it as constitutional error. That Court, citing *Commonwealth v. St. Peter*, 48 Mass. App. Ct. 517, 523, 722 N.E.2d 1002 (2000)(a non-constitutional error case), decided that the error here was not "materially prejudicial". While this may be an interesting test for harmless error, it jettisons federal constitutional jurisprudence. Here, the Commonwealth was required to demonstrate that the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). This is not the first time that the Appeals Court has demonstrated its antipathy to employing *Chapman*. *See Fortini v. Murphy*, 257 F.3d 39 (1st Cir. 2001), *cert. denied*, 122 S.Ct.

1609 (2002). It is time for the Appeals Court to follow the law on harmless error analysis.

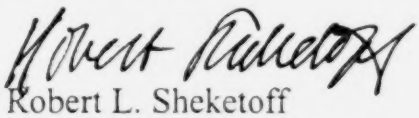
The Constitution requires state courts to apply the stricter *Chapman* type analysis on direct review. *California v. Roy*, 519 U.S. 2, 5 (1996). In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), this Court held that the appropriate standard of review for claims of constitutional error on collateral review is not *Chapman* but the more forgiving standard laid out in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). In dissent, Justice White questioned the fate of those petitioners who would be entitled to relief on direct review had not the state courts failed to notice the constitutional error or erroneously applied harmless error analysis. *See Brecht*, 607 U.S. at 645.

In fact, the Circuits are split on the standard to apply on habeas corpus when the state court has failed to apply *Chapman*. *Compare Bains v. Cambra*, 204 F.3d 964, 976-77 (9th Cir.), *cert. denied*, 121 S. Ct. 627 (2000)(collecting numerous cases applying *Brecht*), *with Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993) (*contra*), *cert. denied*, 511 U.S. 1063 (1994). The petitioner here on habeas review before the First Circuit would probably be faced with the *Brecht* standard, but cannot be sure. *See Sanna v. DiPaolo*, 265 F.3d 1, 15 n.6 (1st Cir. 2001). Certiorari should be granted and the case remanded for the application of *Chapman* review. *See Rose v. Clark*, 478 U.S. 570 (1986) and *United States v. Hastings*, 478 U.S. 570 (1986) (remanding to apply *Chapman*).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
By his attorney,



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APPENDIX

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COMMONWEALTH vs.GEORGE BARBOZA.
No. 00-P-727

Middlesex. November 7, 2001. – March 1, 2002.
Present: Laurence, Smith, & Kafker, JJ.

Rape. Indecent Assault and Battery. Practice, Criminal, Motion to suppress. Evidence, Wiretap, Tape recording, Cross-examination, Bias. Witness, Bias. Search and Seizure, Fruits of illegal search.

INDICTMENTS found and returned in the Superior Court Department on March 4, 1997.

A pretrial motion to suppress evidence was heard by Robert A. Barton, J., and the cases were tried before Nonnie S. Burns, J

Robert L. Sheketoff for the defendant.
Peter D'Angelo, Assistant District Attorney, for the Commonwealth.

KAFKER, J. A father, fearing that his fifteen year old son, Tom, was having a sexual relationship with the fifty-seven year old defendant, George Barboza, placed a tape recording device on the family telephone. He thereby intercepted and recorded four telephone conversations between the defendant and Tom without their knowledge. Two of the conversations were recorded before the father informed the police that he was recording the conversations, and two recordings were made after he had informed the police of his activities. The recorded telephone conversations confirmed the existence of an ongoing sexual relationship between the defendant and Tom In his ruling on the defendant's motion to suppress the tapes of the four telephone conversations, the motion judge allowed the use of the two earlier calls in evidence and suppressed those recordings made after the police were informed of the secret taping. At trial, in

addition to the tape recordings of the two earlier calls, the evidence included Tom's descriptions of numerous acts of indecent touching, and oral and anal sex committed by the defendant. The jury convicted the defendant on all four counts of rape of a child under sixteen, and two counts of indecent assault and battery on a child under fourteen.

The defendant raises the following issues on appeal: (1) the recordings of the two earlier calls should have been suppressed; (2) other evidence which he claims was obtained as a result of the recordings should have been suppressed as "fruit of the poisonous tree"; (3) his attorney's cross-examination of witnesses for bias was improperly limited; and (4) ineffective assistance of counsel. For the reasons discussed below, we affirm.

1. Evidence at the hearing on the suppression motion. Although the motion judge did not make explicit factual findings, the only evidence at the hearing on the suppression motion was the uncontroverted testimony of the parents of the victim. The judge's statement at the end of the hearing, and his subsequent denial of the suppression motion, clearly indicated that he credited the parents' testimony. *See Commonwealth v. Dayes*, 49 Mass. App. Ct. 419, 420 (2000). *See also Commonwealth v. Grandison*, 433 Mass. 135, 137 (2001). The testimony was as follows: Tom was born on May 7, 1981. His father worked for the defendant in the early 1970's, but the defendant and Tom's family had only occasional contact until approximately 1993, when the family moved to the same town where the defendant lived. They began meeting frequently, and on some weekends, Tom would stay overnight with the defendant at his home. The family also spent Christmas with the defendant at his second home in Florida in 1994 and 1996, and in 1995, Tom alone visited the defendant in Florida over February vacation.

Tom's parents began to feel uneasy about their son's close relationship with the defendant after the family's 1996 visit to Florida. During that visit, Tom stayed in one hotel room with the

defendant, while his parents and their other son stayed in a second room. Tom also had little interaction with his parents on the vacation. They were further disconcerted when Tom announced that it was his intention after he graduated from high school to live with the defendant in Florida. After the family returned from Florida in December, 1996, the defendant called Tom on a regular basis. The parents noticed that when Tom spoke with the defendant on the telephone, he would be unusually quiet, and sometimes even denied afterwards that he had spoken to the defendant.

After discussing his concerns with his wife, Tom's father ordered a tape recorder that he had seen advertised in a magazine in order to record secretly telephone conversations at his house. Tom's father attached the machine to the telephone line in his bedroom, and hid it under the bed. Neither Tom nor his brother knew the tape recorder had been installed. Four telephone calls between Tom and the defendant were recorded, two occurring on January 30, 1997, one on February 2, 1997, and one on February 5, 1997. The defendant was calling from his home in Florida. In all of the conversations, the defendant declared that he loved Tom, and in at least the last three conversations, there are references to masturbation. Further, in the second call on January 30, the defendant mentions "making love."

On the evening of January 30, after listening to the tape of the two calls that came that day from the defendant, Tom's father met with members of the Wilmington police department, and played portions of the second taped conversation for them. On February 5, Tom's father and mother confronted Tom, informing him they knew there "was some kind of sexual thing going on" between him and the defendant. On February 7, Tom and his father went to the district attorney's office. During that interview, the father was asked by the district attorney's office not to tape record any additional telephone conversations. A Wilmington police detective, Patrick King, listened to two additional telephone conversations between Tom and the defendant, with Tom's knowledge, before the defendant was

arrested upon his return from Florida on February 14. These conversations were not recorded, and were not the subject of the defendant's motion to suppress. On appeal, the defendant argues that testimony concerning the content of these telephone calls should have been suppressed as having been derived from the suppressed recordings. *See infra* at 108-109.

At the close of the hearing, the motion judge stated that "[t]here's no question in the Court's mind at all that the [parents'] primary concern was their son and that everything they did was not to assist law enforcement in their minds but to try to figure out what was going on and what's right for their son and for their family." The judge denied the motion to suppress with respect to the two conversations taped on January 30, "before contacting police." He allowed the defendant's motion to suppress the two recordings of conversations made after Tom's father notified the police that he was recording phone calls, finding that although the parents were not told to continue taping by the police, "under the circumstances, silence by the police made the parents unwitting agents of the police for the purposes of continuing to record telephone calls from the defendant."

II. Analysis of the suppression issues. A. Massachusetts Wiretap Statute. We begin our analysis by interpreting the Massachusetts wiretap statue. Unlike many of its counterparts in other States, or the Federal wiretap statute, the Massachusetts wiretap statute, G.L. c.272, §99, requires both parties to consent to the recording of telephone calls for the recording to be legal. *Commonwealth v. Hyde*, 434 Mass. 594, 599 (2001). With exceptions not applicable here, the Massachusetts wiretap statute, therefore, "strictly prohibits the secret electronic recording by a private individual of any oral communication...." *Id.* At 595. Nevertheless, the statute does not "mandate that all unlawfully intercepted communications should be suppressed." *Commonwealth v. Crowley*, 43 Mass. App. Ct. 919, 919 (1997). *See Commonwealth v. Hyde*, 434 Mass. at 601 (drawing distinction between "the admissibility of a secret recording as evidence" and "whether a violation of the statute had occurred").

Rather, it has been held that although "[a]ny person who is a defendant in a criminal trial...may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom...[if] [t]hat...communication was unlawfully intercepted," G.L. c.272, §99 P, the "Legislature has left it to the courts to decide whether unlawfully intercepted communications must be suppressed." *Commonwealth v. Santoro*, 406 Mass. 421, 423 (1990).

In *Santoro*, the defendant was convicted of being present where betting apparatus was found. He appealed the denial of his motion to suppress recordings of telephone conversations between him and his associate in crime, which were made by his associate without the defendant's knowledge, in violation of G.L. c.272, §99. The court affirmed the denial of the suppression motion. The key paragraph in the court's discussion, which merits full quotation, is as follows: "Exclusionary rules generally are intended to deter future police conduct in violation of constitutional or statutory rights. However, no police or governmental conduct was involved in the recording of these telephone conversations. A private individual, apparently engaged in unlawful activity himself, recorded the defendant's conversations in violation of §99. No deterrent purpose would be served by suppressing the intercepted conversations. The exclusionary rule was not designed to protect persons from the consequences of the unlawful seizure of evidence by their associates in crime. *See* §99A (preamble). Indeed, a contrary result would aid criminals by assuring that, in many instances, telephone calls they might unlawfully record could not be used as incriminating evidence." *Id.* at 423-424.

The defendant here argues that the holding in *Santoro* is limited to the factual situation in which one criminal associate has recorded the other. He further argues that the recordings made by Tom's father should have been suppressed to promote the general purpose of the wiretap statute. We are not persuaded that *Santoro* is limited to cases involving a criminal defendant recording his associate. In determining whether suppression was

required, the court based its decision on the exclusionary rule's purpose of deterring future police misconduct. *Ibid.* *See Commonwealth v. Leone*, 386 Mass. 329, 333 (1982) ("Evidence discovered and seized by private parties is admissible without regard to the methods used, unless State officials have investigated or participated in the search"); *Commonwealth v. Brandwein*, 435 Mass. 623, 632 (2002) ("exclusionary rule does not exclude evidence obtained by way of purely private conduct or misconduct"). By suppressing the two recordings made after the police were alerted, the motion judge here furthered that objective. As for the first two recordings, "a private individual," without police knowledge, recorded the telephone calls. Moreover, as the motion judge stated, "[t]here's no question in the Court's mind at all that the [parents'] primary concern was their son and that everything they did was not to assist law enforcement in their minds but to try and figure out what was going on and what's right for their son and their family." *See Commonwealth v. Richmond*, 379 Mass. 557, 561 (1980) (no suppression even if opening by mother of defendant's girlfriend of incriminating letter written by defendant to his girlfriend was unlawful, as "the mother was acting in the interests of her daughter, and not on behalf of the police"). In these circumstances, as in *Santoro*, "no deterrent purpose" related to official misconduct is served by suppressing the conversations. *Commonwealth v. Santoro, supra. See Commonwealth v. Brandwein, supra; Commonwealth v. Crowley*, 43 Mass. App. Ct. at 919-920. Just as the exclusionary rule was not designed to protect the defendant in *Santoro* from "the consequences" of the unlawful interception by his criminal associate, we see no reason why the rule should protect the defendant here from the consequences of the unlawful interception by a private citizen, a father, acting in the privacy of his own home, without any government involvement, to protect his child from sexual exploitation by the defendant.

B. Claims based on federal wiretap statute. The defendant argues for the first time on appeal that the

interceptions would have violated, and been suppressed under, the Federal wiretap statute, 18 U.S.C. §§2510 *et seq.* (Title III), and that because the State wiretap law must be at least as strict as the Federal law, the interceptions must be suppressed under State law as well. He relies on the failure to argue Federal law as the basis of a claim of ineffective assistance of counsel.

"[A]lthough a State [wiretap] statute may adopt standards more stringent than the requirements of Federal law, thus excluding from State courts evidence that would be admissible in Federal courts, a State may not adopt standards that are less restrictive" and would thereby allow evidence in State court that would be inadmissible in Federal court. *Commonwealth v. Vitello*, 367 Mass. 224, 247 (1975). We conclude, however, that Federal law does not change the analysis in the instant case, nor does it create a basis for an ineffective assistance of counsel claim, because, as concluded by all the Federal appellate courts that have considered the proper application of Title III in cases in which custodial parents eavesdrop on or secretly record conversations of their minor children in their own home, no violation of Title III has occurred.

Some Federal courts have found that the Federal statute's one-party consent requirement, 18 U.S.C. §2511(2)(d), is satisfied in these circumstances, with consent coming from the parent vicariously on behalf of his or her minor child. *See Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998) (holding secret taping within home by custodial parent of fourteen year old's telephone conversations with her non-custodial parent permissible if consenting parent demonstrates "a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child"). After *Pollock*, several other Federal district courts and also some State courts have considered the question, and all have ruled that the parents consented vicariously to the taping of their minor child's conversations, when the taping was motivated by a genuine concern for the child's well being. *See Wagner v. Wagner*, 64 F. Supp. 2d 895, 896(D. Minn. 1999); *March v. Levine*, 136 F.

Supp. 2d 831, 849 n.39 (M.D. Tenn. 2000), *aff'd*, 249 F.3d 462 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 810 (2002); *Williams v. Williams*, 459 Mich. 988 (1999) (remanding case to lower court for reconsideration in light of *Pollock*).

Other courts, focusing on their sense of "Congress's intention to abjure from deciding a very intimate question of familial relations, that of the extent of privacy family members may expect within the home vis-a-vis each other," *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991), *cert. denied*, 502 U.S. 1044 (1992), have relied on the extension telephone exception, 18U.S.C. §2510(5)(a)(i), to uphold the introduction of evidence obtained through taping or eavesdropping within the family home. The extension *telephone exception exempts from the statute equipment*, e.g., a second residential telephone, used by a telephone service subscriber in the ordinary course of business. This exception has been read to permit family members within their own homes to eavesdrop on, and even record, each other. *See e.g. Janecka v. Franklin*, 843 F.2d 110, 111 (2d Cir. 1988) (intercepts by recording device attached to home telephone permissible under extension telephone exception); *Newcomb, supra* at 1536 (mother's recording at her home of her minor son's telephone conversations with his father, as father instructed child to set fire to family home, did not violate Title III); *Scheib v. Grant*, 22 F.3d 149, 154 (7th Cir.), *cert. denied*, 513 U.S. 929 (1994) (recording by telephone answering machine attached to extension phone allowed under exception where father concerned about minor child's abuse by mother).

Although the facts of these cases involve one family member intercepting the telephone calls of another to protect a child, we do not read the Federal cases as limiting the parents' rights to intercept calls to those from family members. In fact, in *Vieux v. Pepe*, 184 F.3d 59, 67 n.5 (1st Cir. 1999), *cert. denied*, 528 U.S. 1163 (2000), in which a younger sister eavesdropped on her mother's conversation with the defendant who was feared to have raped her older sister, the court noted that intercepted statements regarding "an alleged crime against another family

member, wouldn't be so close a question as one that fell within the scope of Congress's concern about evidence from wiretaps being used in marital disputes." *See New Jersey v. Diaz*, 308 N.J. Super. 504, 516 (1998) (audio portion of secretly made videotape of nanny assaulting and verbally abusing infant was properly admitted under vicarious consent exception).

We conclude that a recording by parents of their own minor son talking on the telephone in their own home, motivated by concerns that he was being sexually exploited by an adult, does not violate Title III. As a result, the defendant was not deprived of any substantial ground of defense, *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974), due to his counsel's not raising the Federal statute below.

C. Other suppression claims. The defendant argues that evidence obtained as a result of the interception of his conversations must also be suppressed under 18U.S.C. §2515. He claims for the first time on appeal that Tom's testimony is a "fruit" of illegally taped calls. Even if we were to assume that Tom would not have been prepared to testify if he had not been confronted with any tape recordings revealing his relationship with the defendant, the first two recordings were properly admitted and formed a more than sufficient basis for his parents to confront him, which led to his coming forward and testifying. *See Commonwealth v. Buchanan*, 384 Mass. 103, 108 (1981) ("The doctrine of the fruit of the poisonous tree .... is not implicated if the tree is not poisonous").

The defendant also objects for the first time on appeal to the introduction of a sentimental greeting card that he sent Tom with a preprinted message expressing "all the wonderful feelings I've known because of you," and including the language "I love you more than ever .... for all the reasons that made me fall in love with you in the first place and all the other lovable qualities you've shown me since then." He alerted Tom to the arrival of the card in one of the conversations allowed in evidence by the judge. The defendant also mentioned the card in the conversation of February 2, the recording of which was suppressed by the

judge. Because the denial of the motion to suppress the first two conversations, recorded before the police were contacted, was not erroneous, evidence obtained as a result of these conversations was properly admitted in evidence at trial. *Commonwealth v. Buchanan*, 384 Mass. at 108

Regarding the testimony of Detective King, the defendant cannot establish that the later conversations which King listened to are "fruits" of a suppressed telephone call. Rather, the detective was informed of the follow-up telephone calls by monitoring Tom's interview with the district attorney's office.

III. Limitation on cross-examination at trial. During the cross-examination of Tom at trial, he was asked whether he met with a "private civil lawyer." The prosecution's objection to the questioning was sustained by the trial judge. On cross-examination of Tom's mother, defense counsel was cut short once again by the judge after defense counsel asked Tom's mother whether she "took [Tom] to see an attorney." The defendant claims that the prosecutor played up his advantage in closing argument, when he emphasized the defendant's motive to lie, while the defendant's chance to question Tom and his family about their motives to fabricate had been foreclosed by the judge.

"If, on the facts, there is a possibility of bias, even a remote one, the judge has no discretion to bar all inquiry into the subject." *Commonwealth v. Tam Bui*, 419 Mass. 392, 400, *cert. denied*, 516 U.S. 861 (1995). At trial, the judge sustained the prosecutor's objections to questions regarding the goals of Tom's family in contacting and meeting with a civil attorney. If the family hoped to sue the defendant in a civil suit and thereby win money damages, that fact was relevant to the jury's determination of any bias on the family's part that could shade their testimony against the defendant. The judge erred when she foreclosed cross-examination on the family's motives for contacting a civil attorney, and whether their goals in doing so could have led them to offer biased testimony. In the context of the trial, however, the

error was not materially prejudicial. *See Commonwealth v. St. Peter*, 48 Mass. App. Ct. 517, 523 (2000).

The evidence against the defendant was overwhelming. It included the tape recordings of conversations between Tom and the defendant; Tom's detailed description of indecent touching and the oral and anal sex acts committed by the defendant; a sentimental greeting card the defendant sent to Tom; and the defendant's own testimony, including his attempts (which the jury could well have found implausible) to explain parts of the recorded conversations in which he refers to "making love" and discusses masturbation. Given the strength of the Commonwealth's case against the defendant, we conclude with assurance that the judge's error did not substantially sway the outcome of the case. *Commonwealth v. Alves*, 50 Mass. App. Ct. 796, 806 (2001).

Judgments affirmed.

Supreme Judicial Court for the Commonwealth of Massachusetts
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RE: Docket No. FAR-12484

COMMONWEALTH

vs.

GEORGE BARBOZA

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review has been considered by the Court and is denied.

Susan Mellen, Clerk

To: James W. Sahakian, Esquire
Peter D'Angelo, A.D.A.
Robert L. Sheketoff, Esquire

18 U.S.C. §2510. Definitions

As used in this chapter –

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than -

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means -

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code;

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include -

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

(13) "user" means any person or entity who -

(A) uses an electronic communication service; and

(B) is duly authorized by the provider of such service to engage in such use;

(14) "electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;

(16) "readily accessible to the general public" means, with respect to a radio communication, that such communication is not -

(A) scrambled or encrypted;

(B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(C) carried on a subcarrier or other signal subsidiary to a radio transmission;

(D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

(E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

[(F) Repealed.]

(17) "electronic storage" means -

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; and

(18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

18 U.S.C. §2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who -

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when -

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having

reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation, shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents,

landlord, custodian, or other specified person, has been provided with -

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required, setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order or certification under this chapter.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter or chapter 121, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person -

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;
(ii) to intercept any radio communication which is transmitted -
(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;
(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;
(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or
(IV) by any marine or aeronautical communications system;
(iii) to engage in any conduct which -
(I) is prohibited by section 633 of the Communications Act of 1934; or (II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act; (iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or (v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.
(h) It shall not be unlawful under this chapter -
(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or (ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or

electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication -

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then -

(i) if the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and
(ii) if the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, the offender shall be fined under this title.
(c) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted -
(i) to a broadcasting station for purposes of retransmission to the general public; or
(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls, not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.
(5)(a)(i) If the communication is -
(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or
(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the

person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.
(ii) In an action under this subsection -
(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and
(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.
(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

18 U.S.C. §2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

M.G.L. c.272, §99. Interception of wire and oral communications.

A. Preamble.

The general court finds that organized crime exists within the commonwealth and that the increasing activities of organized crime constitute a grave danger to the public welfare and safety. Organized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living.

The general court further finds that because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective in the investigation of illegal acts committed by organized crime. Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized criminal activities.

The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime.

B. Definitions. As used in this section--

1. The term "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception.

2. The term "oral communication" means speech, except such speech as is transmitted over the public air waves by radio or other similar device.

3. The term "intercepting device" means any device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication other than a hearing aid or similar device which is being used to correct subnormal hearing to normal and other than any telephone or telegraph instrument, equipment, facility, or a component thereof, (a) furnished to a subscriber or user by a communications common carrier in the ordinary course of its business under its tariff and being used by the subscriber or user in the ordinary course of its business; or (b) being used by a communications common carrier in the ordinary course of its business.

4. The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

5. The term "contents", when used with respect to any wire or oral communication, means any information concerning the identity of the parties to such communication or the existence, contents, substance, purport, or meaning of that communication.

6. The term "aggrieved person" means any individual who was a party to an intercepted wire or oral communication or who was named in the warrant authorizing the interception, or who would otherwise have standing to complain that his personal or property interest or privacy was invaded in the course of an interception.

7. The term "designated offense" shall include the following offenses in connection with organized crime as defined in the preamble: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gaming in violation of section seventeen of chapter two hundred and seventy-one of the general laws, intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

8. The term "investigative or law enforcement officer" means any officer of the United States, a state or a political subdivision of a state, who is empowered by law to conduct investigations of, or to make arrests for, the designated offenses, and any attorney authorized by law to participate in the prosecution of such offenses.

9. The term "judge of competent jurisdiction" means any justice of the superior court of the commonwealth.

10. The term "chief justice" means the chief justice of the superior court of the commonwealth.

11. The term "issuing judge" means any justice of the superior court who shall issue a warrant as provided herein or in the event of his disability or unavailability any other judge of competent jurisdiction designated by the chief justice.

12. The term "communication common carrier" means any person engaged as a common carrier in providing or operating wire communication facilities.

13. The term "person" means any individual, partnership, association, joint stock company, trust, or corporation, whether or not any of the foregoing is an officer, agent or employee of the United States, a state, or a political subdivision of a state.

14. The terms "sworn" or "under oath" as they appear in this section shall mean an oath or affirmation or a statement subscribed to under the pains and penalties of perjury.
15. The terms "applicant attorney general" or "applicant district attorney" shall mean the attorney general of the commonwealth or a district attorney of the commonwealth who has made application for a warrant pursuant to this section.
16. The term "exigent circumstances" shall mean the showing of special facts to the issuing judge as to the nature of the investigation for which a warrant is sought pursuant to this section which require secrecy in order to obtain the information desired from the interception sought to be authorized.
17. The term "financial institution" shall mean a bank, as defined in section 1 of chapter 167, and an investment bank, securities broker, securities dealer, investment adviser, mutual fund, investment company or securities custodian as defined in section 1.165-12(c)(1) of the United States Treasury regulations.
18. The term "corporate and institutional trading partners" shall mean financial institutions and general business entities and corporations which engage in the business of cash and asset management, asset management directed to custody operations, securities trading, and wholesale capital markets including foreign exchange, securities lending, and the purchase, sale or exchange of securities, options, futures, swaps, derivatives, repurchase agreements and other similar financial instruments with such financial institution.

C. Offenses.

1. Interception, oral communications prohibited.

Except as otherwise specifically provided in this section any person who--

willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more

than two and one half years, or both so fined and given one such imprisonment.

Proof of the installation of any intercepting device by any person under circumstances evincing an intent to commit an interception, which is not authorized or permitted by this section, shall be prima facie evidence of a violation of this subparagraph.

2. Editing of tape recordings in judicial proceeding prohibited.

Except as otherwise specifically provided in this section any person who willfully edits, alters or tampers with any tape, transcription or recording of oral or wire communications by any means, or attempts to edit, alter or tamper with any tape, transcription or recording of oral or wire communications by any means with the intent to present in any judicial proceeding or proceeding under oath, or who presents such recording or permits such recording to be presented in any judicial proceeding or proceeding under oath, without fully indicating the nature of the changes made in the original state of the recording, shall be fined not more than ten thousand dollars or imprisoned in the state prison for not more than five years or imprisoned in a jail or house of correction for not more than two years or both so fined and given one such imprisonment.

3. Disclosure or use of wire or oral communications prohibited.

Except as otherwise specifically provided in this section any person who--

a. willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception; or

b. willfully uses or attempts to use the contents of any wire or oral communication, knowing that the information was obtained through interception, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

4. Disclosure of contents of applications, warrants, renewals, and returns prohibited.

Except as otherwise specifically provided in this section any person who--

willfully discloses to any person, any information concerning or contained in, the application for, the granting or denial of orders for interception, renewals, notice or return on an ex parte order granted pursuant to this section, or the contents of any document, tape, or recording kept in accordance with paragraph N, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

5. Possession of interception devices prohibited.

A person who possesses any intercepting device under circumstances evincing an intent to commit an interception not permitted or authorized by this section, or a person who permits an intercepting device to be used or employed for an interception not permitted or authorized by this section, or a person who possesses an intercepting device knowing that the same is intended to be used to commit an interception not permitted or authorized by this section. shall be guilty of a misdemeanor punishable by imprisonment in a jail or house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

The installation of any such intercepting device by such person or with his permission or at his direction shall be prima facie evidence of possession as required by this subparagraph.

6. Any person who permits or on behalf of any other person commits or attempts to commit, or any person who participates in a conspiracy to commit or to attempt to commit, or any accessory to a person who commits a violation of subparagraphs 1 through 5 of paragraph C of this section shall be punished in the same manner as is provided for the respective offenses as described in subparagraphs 1 through 5 of paragraph C.

D. Exemptions.

1. Permitted interception of wire or oral communications.

It shall not be a violation of this section--

a. for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of service or to the protection of the rights or property of the carrier of such communication, or which is necessary to prevent the use of such facilities in violation of section fourteen A of chapter two hundred and sixty-nine of the general laws; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

b. for persons to possess an office intercommunication system which is used in the ordinary course of their business or to use such office intercommunication system in the ordinary course of their business.

c. for investigative and law enforcement officers of the United States of America to violate the provisions of this section if acting pursuant to authority of the laws of the United States and within the scope of their authority.

d. for any person duly authorized to make specified interceptions by a warrant issued pursuant to this section.

e. for investigative or law enforcement officers to violate the provisions of this section for the purposes of ensuring the safety of any law enforcement officer or agent thereof who is acting in an undercover capacity, or as a witness for the commonwealth; provided, however, that any such interception which is not otherwise permitted by this section shall be deemed unlawful for purposes of paragraph P.

f. for a financial institution to record telephone communications with its corporate or institutional trading partners in the ordinary course of its business; provided, however, that such financial institution shall establish and maintain a procedure to provide semi-annual written notice to its corporate and institutional

trading partners that telephone communications over designated lines will be recorded.

2. Permitted disclosure and use of intercepted wire or oral communications.

a. Any investigative or law enforcement officer, who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence in the proper performance of his official duties.

b. Any investigative or law enforcement officer, who, by any means authorized by this section has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents or evidence in the proper performance of his official duties.

c. Any person who has obtained, by any means authorized by this section, knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any state or in any federal or state grand jury proceeding.

d. The contents of any wire or oral communication intercepted pursuant to a warrant in accordance with the provisions of this section, or evidence derived therefrom, may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.

e. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this section shall lose its privileged character.

E. Warrants: when issuable:

A warrant may issue only:

1. Upon a sworn application in conformity with this section; and

2. Upon a showing by the applicant that there is probable cause to believe that a designated offense has been, is being, or is about to be committed and that evidence of the commission of such an offense may thus be obtained or that information which will aid in the apprehension of a person who the applicant has probable

cause to believe has committed, is committing, or is about to commit a designated offense may thus be obtained; and

3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

F. Warrants: application.

1. Application. The attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney may apply ex parte to a judge of competent jurisdiction for a warrant to intercept wire or oral communications. Each application ex parte for a warrant must be in writing, subscribed and sworn to by the applicant authorized by this subparagraph.

2. The application must contain the following:

a. A statement of facts establishing probable cause to believe that a particularly described designated offense has been, is being, or is about to be committed; and

b. A statement of facts establishing probable cause to believe that oral or wire communications of a particularly described person will constitute evidence of such designated offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense; and

c. That the oral or wire communications of the particularly described person or persons will occur in a particularly described place and premises or over particularly described telephone or telegraph lines; and

d. A particular description of the nature of the oral or wire communications sought to be overheard; and

e. A statement that the oral or wire communications sought are material to a particularly described investigation or prosecution and that such conversations are not legally privileged; and

f. A statement of the period of time for which the interception is required to be maintained. If practicable, the application should designate hours of the day or night during which the oral or wire

communications may be reasonably expected to occur. If the nature of the investigation is such that the authorization for the interception should not automatically terminate when the described oral or wire communications have been first obtained, the application must specifically state facts establishing probable cause to believe that additional oral or wire communications of the same nature will occur thereafter; and

g. If it is reasonably necessary to make a secret entry upon a private place and premises in order to install an intercepting device to effectuate the interception, a statement to such effect; and

h. If a prior application has been submitted or a warrant previously obtained for interception of oral or wire communications, a statement fully disclosing the date, court, applicant, execution, results, and present status thereof; and

i. If there is good cause for requiring the postponement of service pursuant to paragraph L. subparagraph 2, a description of such circumstances, including reasons for the applicant's belief that secrecy is essential to obtaining the evidence or information sought.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts establishing such probable cause are derived in whole or part from the statements of persons other than the applicant, the sources of such information and belief must be either disclosed or described; and the application must contain facts establishing the existence and reliability of any informant and the reliability of the information supplied by him. The application must also state, so far as possible, the basis of the informant's knowledge or belief. If the applicant's information and belief is derived from tangible evidence or recorded oral evidence, a copy or detailed description thereof should be annexed to or included in the application. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact

or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant or information and belief, with the source thereof, and reason therefor, specified.

G. Warrants: application to whom made.

Application for a warrant authorized by this section must be made to a judge of competent jurisdiction in the county where the interception is to occur, or the county where the office of the applicant is located, or in the event that there is no judge of competent jurisdiction sitting in said county at such time, to a judge of competent jurisdiction sitting in Suffolk County; except that for these purposes, the office of the attorney general shall be deemed to be

H. Warrants: application how determined.

1. If the application conforms to paragraph F, the issuing judge may examine under oath any person for the purpose of determining whether probable cause exists for the issuance of the warrant pursuant to paragraph E. A verbatim transcript of every such interrogation or examination must be taken, and a transcription of the same, sworn to by the stenographer, shall be attached to the application and be deemed a part thereof.

2. If satisfied that probable cause exists for the issuance of a warrant the judge may grant the application and issue a warrant in accordance with paragraph I. The application and an attested copy of the warrant shall be retained by the issuing judge and transported to the chief justice of the superior court in accordance with the provisions of paragraph N of this section.

3. If the application does not conform to paragraph F, or if the judge is not satisfied that probable cause has been shown sufficient for the issuance of a warrant, the application must be denied.

I. Warrants: form and content.

A warrant must contain the following:

1. The subscription and title of the issuing judge; and

2. The date of issuance, the date of effect, and termination date which in no event shall exceed thirty days from the date of

effect. The warrant shall permit interception of oral or wire communications for a period not to exceed fifteen days. If physical installation of a device is necessary, the thirty-day period shall begin upon the date of installation. If the effective period of the warrant is to terminate upon the acquisition of particular evidence or information or oral or wire communication, the warrant shall so provide; and

3. A particular description of the person and the place, premises or telephone or telegraph line upon which the interception may be conducted; and

4. A particular description of the nature of the oral or wire communications to be obtained by the interception including a statement of the designated offense to which they relate; and

5. An express authorization to make secret entry upon a private place or premises to install a specified intercepting device, if such entry is necessary to execute the warrant; and

6. A statement providing for service of the warrant pursuant to paragraph L except that if there has been a finding of good cause shown requiring the postponement of such service, a statement of such finding together with the basis therefor must be included and an alternative direction for deferred service pursuant to paragraph L, subparagraph 2.

J. Warrants: renewals.

1. Any time prior to the expiration of a warrant or a renewal thereof, the applicant may apply to the issuing judge for a renewal thereof with respect to the same person, place, premises or telephone or telegraph line. An application for renewal must incorporate the warrant sought to be renewed together with the application therefor and any accompanying papers upon which it was issued. The application for renewal must set forth the results of the interceptions thus far conducted. In addition, it must set forth present grounds for extension in conformity with paragraph F, and the judge may interrogate under oath and in such an event a transcript must be provided and attached to the renewal application in the same manner as is set forth in subparagraph 1 of paragraph H.

2. Upon such application, the judge may issue an order renewing the warrant and extending the authorization for a period not exceeding fifteen (15) days from the entry thereof. Such an order shall specify the grounds for the issuance thereof. The application and an attested copy of the order shall be retained by the issuing judge to be transported to the chief justice in accordance with the provisions of subparagraph N of this section. In no event shall a renewal be granted which shall terminate later than two years following the effective date of the warrant.

K. Warrants: manner and time of execution.

1. A warrant may be executed pursuant to its terms anywhere in the commonwealth.

2. Such warrant may be executed by the authorized applicant personally or by any investigative or law enforcement officer of the commonwealth designated by him for the purpose.

3. The warrant may be executed according to its terms during the hours specified therein, and for the period therein authorized, or a part thereof. The authorization shall terminate upon the acquisition of the oral or wire communications, evidence or information described in the warrant. Upon termination of the authorization in the warrant and any renewals thereof, the interception must cease at once, and any device installed for the purpose of the interception must be removed as soon thereafter as practicable. Entry upon private premises for the removal of such device is deemed to be authorized by the warrant.

L. Warrants: service thereof.

1. Prior to the execution of a warrant authorized by this section or any renewal thereof, an attested copy of the warrant or the renewal must, except as otherwise provided in subparagraph 2 of this paragraph, be served upon a person whose oral or wire communications are to be obtained, and if an intercepting device is to be installed, upon the owner, lessee, or occupant of the place or premises, or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.

2. If the application specially alleges exigent circumstances requiring the postponement of service and the issuing judge finds that such circumstances exist, the warrant may provide that an attested copy thereof may be served within thirty days after the expiration of the warrant or, in case of any renewals thereof, within thirty days after the expiration of the last renewal; except that upon a showing of important special facts which set forth the need for continued secrecy to the satisfaction of the issuing judge, said judge may direct that the attested copy of the warrant be served on such parties as are required by this section at such time as may be appropriate in the circumstances but in no event may he order it to be served later than three (3) years from the time of expiration of the warrant or the last renewal thereof. In the event that the service required herein is postponed in accordance with this paragraph, in addition to the requirements of any other paragraph of this section, service of an attested copy of the warrant shall be made upon any aggrieved person who should reasonably be known to the person who executed or obtained the warrant as a result of the information obtained from the interception authorized thereby.

3. The attested copy of the warrant shall be served on persons required by this section by an investigative or law enforcement officer of the commonwealth by leaving the same at his usual place of abode, or in hand, or if this is not possible by mailing the same by certified or registered mail to his last known place of abode. A return of service shall be made to the issuing judge, except, that if such service is postponed as provided in subparagraph 2 of paragraph L, it shall be made to the chief justice. The return of service shall be deemed a part of the return of the warrant and attached thereto.

M. Warrant: return.

Within seven days after termination of the warrant or the last renewal thereof, a return must be made thereon to the judge issuing the warrant by the applicant therefor, containing the following:

a. a statement of the nature and location of the communications facilities, if any, and premise or place where the interceptions were made; and

b. the periods of time during which such interceptions were made; and

c. the names of the parties to the communications intercepted if known; and

d. the original recording of the oral or wire communications intercepted, if any; and

e. a statement attested under the pains and penalties of perjury by each person who heard oral or wire communications as a result of the interception authorized by the warrant, which were not recorded, stating everything that was overheard to the best of his recollection at the time of the execution of the statement.

N. Custody and secrecy of papers and recordings made pursuant to a warrant.

1. The contents of any wire or oral communication intercepted pursuant to a warrant issued pursuant to this section shall, if possible, be recorded on tape or wire or other similar device. Duplicate recordings may be made for use pursuant to subparagraphs 2 (a) and (b) of paragraph D for investigations. Upon examination of the return and a determination that it complies with this section, the issuing judge shall forthwith order that the application, all renewal applications, warrant, all renewal orders and the return thereto be transmitted to the chief justice by such persons as he shall designate. Their contents shall not be disclosed except as provided in this section. The application, renewal applications, warrant, the renewal order and the return or any one of them or any part of them may be transferred to any trial court, grand jury proceeding of any jurisdiction by any law enforcement or investigative officer or court officer designated by the chief justice and a trial justice may allow them to be disclosed in accordance with paragraph D, subparagraph 2, or paragraph O or any other applicable provision of this section.

The application, all renewal applications, warrant, all renewal orders and the return shall be stored in a secure place which shall be designated by the chief justice, to which access shall be denied to all persons except the chief justice or such court officers or administrative personnel of the court as he shall designate.

2. Any violation of the terms and conditions of any order of the chief justice, pursuant to the authority granted in this paragraph, shall be punished as a criminal contempt of court in addition to any other punishment authorized by law.

3. The application, warrant, renewal and return shall be kept for a period of five (5) years from the date of the issuance of the warrant or the last renewal thereof at which time they shall be destroyed by a person designated by the chief justice. Notice prior to the destruction shall be given to the applicant attorney general or his successor or the applicant district attorney or his successor and upon a showing of good cause to the chief justice, the application, warrant, renewal, and return may be kept for such additional period as the chief justice shall determine but in no event longer than the longest period of limitation for any designated offense specified in the warrant, after which time they must be destroyed by a person designated by the chief justice.

O. Introduction of evidence.

1. Notwithstanding any other provisions of this section or any order issued pursuant thereto, in any criminal trial where the commonwealth intends to offer in evidence any portions of the contents of any interception or any evidence derived therefrom the defendant shall be served with a complete copy of each document and item which make up each application, renewal application, warrant, renewal order, and return pursuant to which the information was obtained, except that he shall be furnished a copy of any recording instead of the original. The service must be made at the arraignment of the defendant or, if a period in excess of thirty (30) days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty (30) days before the commencement of the

criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed, at least thirty days before the commencement of the criminal trial, shall render such evidence illegally obtained for purposes of the trial against the defendant; and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

2. In any criminal trial where the commonwealth intends to offer in evidence any portions of a recording or transmission or any evidence derived therefrom, made pursuant to the exceptions set forth in paragraph B, subparagraph 4, of this section, the defendant shall be served with a complete copy of each recording or a statement under oath of the evidence overheard as a result of the transmission. The service must be made at the arraignment of the defendant or if a period in excess of thirty days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed at least thirty days before the commencement of the criminal trial, shall render such service illegally obtained for purposes of the trial against the defendant and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

P. Suppression of evidence.

Any person who is a defendant in a criminal trial in a court of the commonwealth may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom, for the following reasons:

1. That the communication was unlawfully intercepted.
2. That the communication was not intercepted in accordance with the terms of this section.
3. That the application or renewal application fails to set forth facts sufficient to establish probable cause for the issuance of a warrant.
4. That the interception was not made in conformity with the warrant.
5. That the evidence sought to be introduced was illegally obtained.
6. That the warrant does not conform to the provisions of this section.

Q. Civil remedy.

Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person--

1. actual damages but not less than liquidated damages computed at the rate of $100 per day for each day of violation or $1000, whichever is higher;
2. punitive damages; and
3. a reasonable attorney's fee and other litigation disbursements reasonably incurred. Good faith reliance on a warrant issued under this section shall constitute a complete defense to an action brought under this paragraph.

R. Annual report of interceptions of the general court.

On the second Friday of January, each year, the attorney general and each district attorney shall submit a report to the general court stating (1) the number of applications made for warrants during the previous year, (2) the name of the applicant, (3) the number of warrants issued, (4) the effective period for the warrants, (5) the number and designation of the offenses for which those applications were sought, and for each of the designated offenses the following: (a) the number of renewals, (b) the number of interceptions made during the previous year, (c) the number of indictments believed to be obtained as a result of those interceptions, (d) the number of criminal convictions obtained in trials where interception evidence or evidence derived therefrom was introduced. This report shall be a public document and be made available to the public at the offices of the attorney general and district attorneys. In the event of failure to comply with the provisions of this paragraph any person may compel compliance by means of an action of mandamus.